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IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
KEIZO KAMIYAMA,
For a Writ of Habeas Corpus.

Keizo Kamiyama,
Appellant,
vs.
Walter E. Carr, District Director,
United States Immigration Service,
Appellee.

PETITION FOR REHEARING.

J. EDWARD KEATING AND
THEODORE E. BOWEN,
Counsel for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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TABLE OF CASES AND AUTHORITIES CITED.

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To the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and to the Judges Thereof:

Comes now Keizo Kamiyama, the appellant in the above entitled cause, and presents this his petition for a rehearing of the above entitled cause, and in support thereof, respectfully shows:

I.

This Honorable Court having decided the appeal chiefly upon a point not raised by the appellee and argued in the briefs or orally by counsel on either side, petitioner respectfully asks that a rehearing and reargument thereof

be granted. In this regard, petitioner is mindful of the rule of the court (Rule 29) and applicable decisions to the effect that in a petition for rehearing the points should be set forth briefly. For that reason, petitioner will be as brief as possible but the matter cannot be presented without considerable elucidation.

This Honorable Court based its opinion mainly upon the purported failure of counsel to make a reviewable record in the Department of Labor by failing to note and urge objections and exceptions. Many cases involving judicial trials were cited in support of this ruling. (Opinion, p. 3.) Petitioner respectfully contends that by so holding, this court has departed from the long recognized principle that deportation proceedings are informal in nature and are not governed by the rules of evidence and procedure applicable to judicial trials.

Bilokumsky v. Todd, 263 U. S. 149, 157, 44 S. Ct. 54, 68 L. Ed. 221;

U. S. ex rel. Fink v. Todd (C. C. A. 2nd, 1924), 1 Fed. (2d) 246, 248 (reversed on other grounds, 69 L. Ed. 793);

Johnson v. Kock Shing (C. C. A. 1st, 1924), 3 Fed. (2d) 889;

Jung See v. Nash (C. C. A. 8th, 1925), 4 Fed. (2d) 639, 643;

Yip Wah v. Nagle (C. C. A. 9th, 1925), 7 Fed. (2d) 426, 427;

U. S. ex rel. Smith v. Curran (C. C. A. 2nd, 1926), 12 Fed. (2d) 636, 637, 638;

Seif v. Nagle (C. C. A. 9th, 1926), 14 Fed. (2d) 416;

U. S. v. Brough (C. C. A. 2nd, 1926), 15 Fed. (2d) 377, 379;

Kostenowczyk v. Nagle (C. C. A. 9th, 1927), 18 Fed. (2d) 834, 835;

Moy Said Ching v. Tillinghast (C. C. A. 1st, 1927), 21 Fed. (2d) 810, 811;

U. S. v. Flynn (D. C. W. D. N. Y., 1927), 22 Fed. (2d) 174, 176;

Mason v. Tillinghast (C. C. A. 1st, 1928), 27 Fed. (2d) 580;

Gung You v. Nagle (C. C. A. 9th, 1929), 34 Fed. (2d) 848, 852;

In re Sugano (D. C. S. D. Cal., 1930), 40 Fed. (2d) 961.

The following short quotations demonstrate petitioner's contention in this regard:

Bilokumsky v. Todd, 263 U. S. 149, 157, 44 S. Ct. 54, 68 L. Ed. 221:

"A hearing granted does not cease to be fair merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive, or because some evidence has been improperly rejected or received."

Weinbrand v. Prentis (C. C. A. 6th, 1925), 4 Fed. (2d) 778, 779:

"It is well settled that proceedings for the deportation of an alien under the immigration statutes may be summary, and are in no sense a trial for a crime or offense, nor governed by the rules of such trials as to pleadings and evidence; * * *"

Ex parte Keizo Shibata (D. C. S. D. Cal., 1929), 30 Fed. (2d) 942, 945 (reversed on other grounds, ... Fed. .....):

"The Labor Department and its boards of inspection are not bound by strict requirements of court

procedure, neither in the statement of the charge, nor in the mode of proving it."

Not only has the rule contended been applied by the Supreme Court of the United States in *Bilokumsky v. Todd, supra*, but heretofore it has been the ruling and holding of this court as will be shown from the following quotations:

Lew Shee v. Nagle (C. C. A. 9th, 1925), 7 Fed. (2) 367, 368:

"'Such departmental proceedings are not judicial, and a *quasi* appellate review by a court does not make them so.'"

Ghiggeri v. Nagle (C. C. A. 9th, 1927), 19 Fed. (2d) 875, at page 876:

"Having in mind the settled doctrine that in such cases the strict rules of judicial procedure and of proofs do not prevail, we * * *"

Weedin v. Mon Hin (C. C. A. 9th, 1925), 4 Fed. (2d) 533:

"In disposing of the question of the appellee's right to enter the United States we are not confined to a consideration of the grounds on which he was excluded by the local authorities; we may properly advert to other grounds on which as a matter of law that conclusion would follow."

Petitioner urges the learned judge in this court's opinion, by citing authorities applicable to judicial trials, has made the error made by the appellant in *Hom Moon Ong v. Nagle* (C. C. A. 9th, 1929), 32 Fed. (2d) 470, where this court formerly said (page 472):

"The appellant attempts to assimilate the rules governing the functions of a board of special inquiry to those which apply to a court, and cites

> authorities to the proposition that, where a court consists of several judges, the absence of one will work its disorganization, and that a disposition of a case by a court organized in violation of statutory provisions must be held null and void. But, a board of special inquiry is but an instrument of the executive power, and is not a court, and the proceedings to determine the right of a foreign born person, claiming citizenship, to enter the United States, are administrative and not judicial, nor are the members of the board judicial officers."

Is it to be concluded that strict rules of evidence and procedure are not binding on the prosecution but only on the accused?

The grossest unfairness complained of by petitioner consisted of the anonymous communication sent as part of the record from the San Pedro immigration office to Washington, and the reference to other "untruthful" Japanese cases *in the inter-departmental communication from Inspector Gatley to the bureau at Washington.* This Honorable Court is familiar with the fact that counsel are discouraged from making objections in the records of the immigration hearings. Petitioner feels that the court, in taking the position it has taken in the instant case, has receded from the position taken by it in *Maltez v. Nagle* (C. C. A. 9th, 1928), 27 Fed. (2d) 835, 837:

> "Moreover, were it conceded that no formal demand for an opportunity to cross-examine was expressly made at the hearing, we do not think the concession would purge the proceedings of all unfairness. Admittedly appellant objected to the consideration of these statements, and under some general rule of practice before the inspector the alien is discouraged from particularizing his objections or stating the reasons therefor. Counsel for appellant was so admonished again and again in this case. * * *

> "The interests of truth clearly demanded cross-examination, and it should have been invited, not evaded."

The use of *ex parte* communications was recognized as the grossest kind of unfairness in *Swarney v. U. S.*, 7 Fed. (2d), 515, wherein the Circuit Court of Appeals for the Eighth Circuit, said on page 518:

> "*It is contended that the defendant made no objection to the introduction of the affidavit before the inspector and therefore cannot now complain.* It is our understanding that a rule of the department in effect at the time of the hearing provided that 'objections and exceptions of counsel should not be entered on the record but might be presented in accompanying brief.' But, however that may be, we are not inclined to apply strictly the rule as to objections and exceptions in a case where the quasi tribunal itself introduces its own evidence. Our conclusion is that the affidavit in question was not competent evidence, and ought not to have been received, and that its introduction rendered the hearing unfair." (Italics ours.)

On page 5 of this Honorable Court's opinion in the instant case, it is said:

> "It has frequently been held that the Immigration authorities are entitled to take notice of all their records. Lee Chun v. Nagle, 35 Fed. (2d) 839."

We have no quarrel with the proposition that in Chinese cases, where the question of relationship is before a board of special inquiry, that the inconsistent statements of the claimed father and other relations made previously at other hearings could be put in evidence and considered. Such is the holding in *Lee Chun v. Nagle*, *supra*, and is as far as any decided case goes. But that is not the situation in the case at bar. In this case, *after the trial was*

over and the case was closed in so far as the introduction of any further testimony was concerned, either by the alien or by the government, *the Inspector in Charge* at San Pedro, not the authorized trial officer, but a stranger to the case, in a communication dated May 9, 1929, asked the Board of Review to consider the records in two other *independent* Japanese cases as tending to show that because those Japanese lied about a similar situation therefore Keizo Kamiyama should now be considered untruthful. *Those files were not put in evidence* and were not furnished nor available to counsel or the alien. The consideration of such extraneous matter was therefore the most flagrant sort of unfairness. No decided case supports it. On the contrary the case of *Mew ex rel Keung v. Tillinghast* (C. C. A. 1st, 1929) 30 Fed. (2d) 684, held that where a board of special inquiry took extraneous matter into consideration, it rendered the hearing unfair. The case does not expressly say but it must be implied from the opinion that the extraneous matter considered consisted of independent records, not put in evidence at the hearing.

The use of the anonymous communication cannot in our minds be excused by *the technical failure of counsel* to make a *formal* objection in the record of the administrative tribunal. In the case of *Ungar v. Seaman,* 4 Fed. (2d) 80, the Circuit Court of Appeals for the Eighth Circuit said at page 84:

> "The introduction and receipt by the Assistant Secretary of Labor, *after the hearing was closed, without notice to or knowledge of the accused,* of the hearsay statements of the immigration inspector to the effect that the alien was keeping quiet, but that if the warrant proceeding should be canceled he

> would resume his former activities, and that, according to a newspaper report, he was one of a committee of seven to report at a protest meeting against the decision of a court that certain strikers were in contempt of its order, was grossly unfair and unjust. The facts that the Assistant Secretary of Labor called for and caused this evidence to be procured after the hearing of the alien had been concluded in January, 1920, and that seven days after the last of this evidence was reported to him on December 3, 1920, he rendered his decision against the accused leaves little doubt that this later evidence seriously affected his decision. Its receipt and consideration violated the indispensable condition of a fair hearing of a litigated issue that the case shall be decided on the evidence at the hearing, when parties or their counsel were present and that neither party nor court or quasi judicial tribunal shall subsequently receive evidence without notice to the party to be affected or their counsel and time and opportunity to rebut it." (Italics ours.)

The inspector in charge at San Pedro did exactly as prohibited in *Ungar v. Seaman.* He, "after the hearing was closed, without notice to or knowledge of the accused" put his own statements of fact into the record. The statements so put in are not only unfair but false as hereinafter shown.

Before passing from this point, it might be well to note that the Board of Review in Washington, who made the findings and final decision in this case (Decision of June 18, 1929) *has no legal existence whatever.* We submit that *in holding the alien down to strict rules of procedure* by making a record before the Board of Review, the nature of the Board of Review has been confused with the nature of certain quasi judicial governmental boards. For instance, the Interstate Commerce Commis-

sion, the Board of Tax Appeals, the Board of Customs Appeals, and various other Departmental boards have been set up and authorized by acts of Congress, and the procedure before them determined by acts of Congress. Before such boards, therefore, it may well be that the strict rules of procedure such as the stating of objections and exceptions would have to be followed. But nowhere in the Immigration laws or in the laws organizing the Department of Labor has there been any authorization whatsoever for the Board of Review. It has been drawn out of thin air by the Department of Labor. It has no status whatever other than a clerical board before whom a roundtable discussion takes place in order to relieve the Secretary of Labor and his assistant secretaries from the details of going through the various cases. It has been formerly held that the Secretary of Labor could not delegate his power in these matters to the Commissioner of Immigration (*Low Kwai v. Backus,* 229 Fed. 481). Of course, the Assistant Secretaries of Labor and the assistants to the Secretary are empowered to act in these matters now by Statute. 5 U. S. C. 613-a (Act, March 4, 1927, c. 498.) But even if the Secretary should have the power to delegate his function of making the final decision in deportation cases to the Board of Review, still that Board of Review is not a judicial, nor even a quasi judicial, Board, but is only a group of men, having no rules of practice or procedure. *No records of their proceedings are kept or required to be kept by law.* Their findings are based on informal discussion. How can an attorney be required to follow any strict rules of procedure before a Board so constituted?

Even if the Board of Review could be clothed with a judicial character, still the unfairness in depriving an alien of due process of law is so flagrant and so unjust, so highhanded, as to be such that a reviewing court should consider it even though no objections had been made. The general rule is well stated in 3 *Corpus Juris* 744 as follows:

> "An exception to the general rule that an appellate court will not consider objections first raised on appeal exists in the case of errors which are apparent on the face of the record, and which are either fundamental in their character or determine a question on which the case depends, so that the objection, if made, could not have been obviated. Such errors may be considered by the court, although not objected to below. Nor will a failure to object in the court below preclude a review on appeal where there was no reasonable opportunity to object. It has also been held that the rule is not an absolute one, and that it will not be applied where it would, under the circumstances of the case, result in injustice; * * *

II.

On page 4 of the court's opinion, the court said:

> "There is found in the record transmitted to this court an anonymous letter, dated April 25, 1929, addressed to the Los Angeles Immigration Station of San Pedro, California, signed 'A citizen of Los Angeles.' No reference is made in the file to this letter. The inspector in his recommendation, does not refer to it. Apparently it was forward to Washington with his recommendation. After the records arrived in Washington the attorney for the appellant was given an opportunity to inspect the record, and wrote a brief, in which no reference whatever is made to this anonymous letter. The Board of Review subsequently recommended the order of deportation, which was made by the Assistant Secretary of Labor,

> upon that recommendation, and in their recommendation they nowhere allude to the anonymous letter. So far as appears, no attention whatever was given to this letter, either by the immigration authorities or by the appellant."

This statement of the learned judge is confusing to counsel for appellant, for we bear in mind that there is a distinction between "Assistant Secretaries" and "Assistants to the Secretary." Those practicing before the Immigration Service as counsel realize that assistant secretaries are executive officers, whereas the assistants to the secretary are clerical only and perform only clerical duties.

Adverting to the statement that "no reference is made in the file to this letter," we desire to point out that the letter was referred to by the local office in its letter of transmittal to Washington, *and the Board of Review's particular attention was called to it.* In the immigration file will be found a red sheet of paper entitled "Transmission of Record of Warrant Hearings," which is the official letter from the Los Angeles office transmitting the record in the case to Washington. At the bottom of that letter we find the following statement:

> "Attached hereto *for information of the Reviewing Board,* copy of letter addressed this office by the Inspector in Charge, San Pedro, wherein *the evidence and circumstances surrounding* the case are set forth." (Italics ours.)

There we find a direct reference to the letter of Inspector Gatley with a statement that it was sent for *the use* of the Board of Review. Attached to that red sheet is Inspector Gatley's letter which has with it the anonymous communication. The postscript to Inspector Gatley's letter expressly says:

"*Note* attached copy of anonymous letter received April 30, 1929." (Italics ours.)

How can it be said that the attention of the Board of Review was not expressly directed to Inspector Gatley's letter, as well as the anonymous communication?

The Board of Review's attention being directed to these unfair documents, it must be presumed, in the absence of any statement by the Board to the contrary, that these documents were considered by it along with the rest of the record forwarded to the Board by the Los Angeles office. Furthermore, the Board of Review *must* have used the information contained in the anonymous communication in order to sustain its finding that Keizo Kamiyama entered the United States "surreptitiously near Calexico, California, subsequent to July 1, 1924." (Decision of Board of Review, June 18, 1929.) *There is not another scintilla of evidence in the record* establishing *that the alien on trial entered subsequent to that date.* There is only the suspicion that the alien is not Keizo Kamiyama, acquired from the *ex parte* statement taken from him while in jail without a warrant, and from the failure of certain people to identify a photograph. But even this suspicion or even this conclusion if it were sound would not establish that he entered the United States "subsequent to July 1, 1924." The only evidence in the record having anything at all to say that he entered subsequent to July 1, 1924, is the anonymous communication and the conclusion of Mr. Gatley. Thus, it must be concluded that not only was the Board's attention called to these *ex parte* letters, but considerable weight was given to those letters by the Board.

We again quote from the opinion of this Honorable Court on page 4:

> "Appellant asserts in the brief that 'the document was sent on as evidence in the case. It was not shown to the alien, nor was he allowed or permitted to see it, nor to cross-examine its author.' There is no evidence to substantiate this assertion."

We desire here to point out that there is evidence in the record to substantiate the quoted assertion in our brief. In the first place our statement that the document "was sent on as evidence in the case" is established by another reference to the document entitled "Transmission of Records of Warrant Hearings." Under the heading "Comment" the District Director at Los Angeles states that he is sending the copy of the letter written by Inspector in Charge at San Pedro "wherein *the evidence* and circumstances surrounding the case are set forth." In other words, the District Director tells the Board of Review that the evidence in the case is fully set forth in the Inspector in Charge's letter and this letter contained a copy of the anonymous communication and a direct reference to it in the postscript. We believe these facts establish our assertion that the document was sent on as evidence in the case.

Our assertions that the documents were not shown the alien, nor was he permitted to see them or cross-examine the author is likewise borne out by the record. The final hearing was held at San Pedro on March 13, 1929. If the court will examine page 17 of the record of that hearing, it will note that the case was closed on that date and the trial inspector then and there made his findings and recommendation. The case was over; no more evi-

dence could have been introduced by the alien, and certainly none *should have been introduced* after that date by the Immigration Service without notifying counsel or the alien of a reopening. The record establishes that no reopening after that date was ordered and that at no time thereafter was the alien given an opportunity to offer any evidence. The very extraordinary letter of the San Pedro inspector in charge is dated May 9, 1929, or almost two months after the hearing was completed, and was sent in by the Los Angeles office to Washington on May 22 with the record of the completed hearing. Thus was the alien deprived of any opportunity to see the communications before the case was closed, or to offer any evidence to refute the evidence set forth in the communications. Nor was there any time when he could have cross-examined the author of the anonymous communication or see the files referred to by the inspector in charge. This is apparent for the reason that the record was immediately forwarded to Washington for final action.

Now, we wish to call the court's particular attention to the sentence on page 4 of its opinion:

> "After the records arrived in Washington the attorney for the appellant was given an opportunity to inspect the record, and wrote a brief, in which no reference whatever is made of this anonymous letter."

By permitting counsel in Washington to inspect the record does not mean that he was allowed to inspect the inter-departmental communications, but only the record of the hearings. Manifestly the inter-departmental communications containing the letter of Inspector Gatley and

the anonymous communication were no part of these hearings and in truth not part of the "record." Furthermore, counsel's brief before the informal Board of Review, for use at the round table discussion, proceeded on the theory that the alien had sustained the burden of proof, by proving his long-time residence in this country. Counsel had every reason to believe that on the merits of the case, the Board of Review would have decided in the alien's favor. As we have said, there is nothing whatever in the record indicating the alien landed in this country subsequent to July 1, 1924. The only evidence to this effect was contained in the anonymous communication and Inspector Gatley's letter which counsel had every reason to believe the Board would not use in its deliberations, but which obviously was considered. Their use was particularly harmful in the case at bar for the reason that the government must concede that there was considerable evidence in support of the alien's contention. In other words, if the alien's case had been particularly weak, the inclusion of this unfair document might not have been prejudicial, but where the alien's case was particularly strong, as in the case at bar, then it must be presumed that the unfair testimony in evidence was the factor on which the scales were balanced against him.

It is most apparent from the true record that the appellant advanced the defense that his deportation was barred by the statute of limitations. This defense is provided for by an Act of Congress. This defense was clear to the trial officer, Inspector Scott. The trial officer made his findings pursuant to Immigration Rule 18, subdivision D, paragraph 5, and are set out at page 17 of the hearing

of March 13th. (Immigration file.) It will be noted here that the trial officer is himself content to give his opinion that the alien entered subsequent to July 1, 1924, thus bringing the alien within the statute. Our view was then, and is now, that the duty of the Secretary of Labor was to determine whether or not the alien met the burden of proof on that issue, but a closer examination of this file will disclose that the necessity for determining that issue was removed from the Board of Review *by the action of the inspector in charge* who, it will be borne in mind, had nothing to do with the trial of the case. He was not content it seems with the trial officer's general conclusion. We invite the court's particular attention to the write-up and recommendation, not of the trial officer but the inspector in charge, where the following language appears in the last paragraph of that officer's conclusions and findings which, to be technical, we must assume are "findings of fact and conclusions of law":

> *"It is the opinion of this office that the alleged Keizo Kamiyama was smuggled into the United States about January 1, 1926, from Mexico."*

If true or even persuasive it removes all doubt from the Secretary of Labor's mind that the statute applies. *Where is there a single particle of testimony in the record to justify such a finding and conclusion? By no stretch of the imagination can such a finding and conclusion be drawn from the testimony.* It must be apparent that this statement is the creature of the inspector's mind in a desperate effort to break down the defense set up by the appellant. The pains with which the letter is prepared and its invitational character ("being forwarded

for information of the Reviewing Board"), support our theory. It is thus seen that a false statement is made by the inspector in charge and sent on for the information of the Board of Review. We must conclude, therefore, because of its false character and because of the use for which it was sent, that it was deliberately done to mislead the Board of Review, to remove from them the defense proven by the appellant, and in lieu of evidence on the subject.

It is difficult for counsel in this case, to believe that the court intends to permit such unfairness and such misconduct to go on in *an administrative arm* of this government because counsel did not follow a technical, judicial requirement of raising timely objection thereto.

III.

Petitioner now desires to refer briefly to several other portions of the opinion. On page 6, it is said:

> "The appellant also complains of the fact that he was examined by the inspector after his arrest. The record, however, shows that he was informed at the time of his arrest that it was the intention of the immigration authorities to question him and to use his statement as evidence in proceedings against him, and that he expressly consented to the examination, and, thus warned, answered the questions asked of him until he was confronted with an inconsistency in his statement and then refused to answer further questions. He cannot be heard now to object to that to which he formally assented, nor is there any inherent unfairness in questions asked under these circumstances. * * * Nor do we find in the record any objection to the use of this statement at the time of the hearing. As we understand the record, appellant withdrew all objections to the introduction of

this statement. If we are in error in this it is clear that no serious objection was made to this introduction. * * *"

An examination of the immigration file will show that counsel at all times strenuously objected to the statement taken from the alien while he was under arrest without a warrant and while he was being held incommunicado before any charges had been filed against him. The alien was arrested either on or before the 16th of November, 1928. On that day counsel addressed a letter to C. G. Gatley, inspector in charge of the United States Immigration Service at San Pedro, vigorously protesting against the arrest of this alien without a warrant and protesting against any *ex parte* statement being taken from him. Then, at the first regular hearing (December 27, 1929), the immigration file discloses a formal objection to the use of the statement:

"ATTY: Let the records show that copy of this testimony has been furnished to counsel and we have had opportunity to see it and are familiar with it. We object to the introduction of the statement, and request at this time that the letter of J. Edward Keating, attorney at law, dated Nov. 16th, addressed to the inspector in charge of this service at this office, be made part of the record. (Request of atty. granted.) (Letter referred to Marked 'Alien's Exhibit A' and made part of this record.)"

Immigration File, record of hearing of December 27, 1928, pages 1 and 2.

In this regard, we are perfectly in accord with the statement of the court on page 7:

"Had objection been made to the affidavit or statement secured by the immigration authorities after the arrest of the appellant and before his trial, the

> immigration authorities could have withheld the affidavit and utilized the same in cross-examining the appellant."

Now, it being manifest that counsel did object in the only way he could before and at the trial, the immigration service should have proceeded as indicated by the court in the foregoing quotation and by not doing so have deprived him of a fair hearing. The only proper and honest procedure would have been to have put the inspector on the stand to prove the statement so that counsel might have the opportunity to cross-examine him as was suggested in the case of *Ungar v. Seaman,* 4 Fed. (2d) 80 at ——.

On page 5 of the opinion, the court, in referring to the hearing of March 16, said:

> "In this connection it should be added that when the hearing was *renewed*, at the instance of the appellant, on March 16th, * * *" (Italics ours.)

The court evidently is referring to the hearing of March 13 instead of March 16, as we find no hearing of March 16 in the copy of the record furnished us which is presumably correct. However, an examination of the beginning of that hearing will show the following:

> "Continued hearing to show cause in the case of Keizo Kamiyama held at this time *by stipulation* of inspector and attorney for alien."

On page 3 of the opinion the court said:

> "It appears that *from the day after his arrest* appellant was represented by counsel, not only upon the hearing before the immigration authorities in San Pedro, California, but also before the Board of Review, which made the final order of deportation in Washington. * * *" (Italics ours.)

To be sure, the day after the alien was arrested, to-wit: on November 16, counsel addressed a letter to the Immigration Service, which was admittedly received by that Service on the next day. But notwithstanding this written appearance of counsel in the case, on the 17th, presumably after the receipt of that letter, the statement was taken from the alien which developed the discrepancies adverted to by the court on page 7 of the opinion. Can it be said that merely because the alien employed counsel that he has the benefit of counsel when the Immigration Service proceeded to examine him without advising counsel.

On pages 6 and 7 of the opinion, the court apparently takes the view that this alien, because he was relying on the period of limitation prescribed in section 19 of the Immigration Act of 1917 (8 U. S. C. 155) should be held to a stricter degree of proof than an alien who is trying to prove a legal entry into the United States. That defense is allowed by Congress, is absolute and is just as much a defense to deportation as the defense of a legal entry.

The last paragraph of the opinion states that the documentary evidence offered by Keizo Kamiyama was not entitled to much weight. In that regard, we would like to call the court's attention to the fact that in this case Keizo Kamiyama himself testified that he last entered the United States about February 13, 1920. He insisted upon this from the day he was arrested. At the hearing when all parties were represented, he produced documentary evidence in support of his statement. The fact that he had these documents and that they were dated prior to

1924 was certainly corroboration of his own statement. But in addition to the evidence, he had the positive testimony of Mr. Nishimoto that Mr. Nishimoto had known Keizo Kamiyama in this country for about four or five years. (Imm. File, Hearing Mar. 13th.) Opposed to that evidence on behalf of the alien there was not a scintilla of evidence taken at any of the regular hearings to the contrary. The only evidence, if such it can be called, consisted of the discrepancies as to age, made by Keizo Kamiyama at the *ex parte* examination after his illegal arrest and after counsel had protested against the taking of any statements from him until the regular hearing, and of the so-called failure of certain indiscriminate aliens to identify an unidentified photograph out of the presence and view of the alien, and of the anonymous communication and letter of inspector in charge, all put in the record after the hearing was over. It must be admitted that there was not a scintilla of evidence adduced *at the hearing* against Keizo Kamiyama. For these reasons we respectfully submit that the entire proceedings were so unfair as to deprive him of due process of law.

With all due respect to the learned judge's views expressed in this opinion we cannot help but feel that the safer and the soundest philosophy is that expressed by Mr. Justice Hand in *U. S. ex rel Iorio v Day* (C. C. A. 2nd, 1929), 34 Fed. (2nd) 920, 922:

> "The record discloses a very lax regard for the fundamentals of a fair hearing. *Much is tolerated in such proceedings, and that toleration has apparently borne its fruits.* We will not say that we can put our finger on this or that to reverse, but the attitude of the examiner, the introduction of confused

and voluminous evidence taken elsewhere, the strong indications that the appellant was vaguely regarded as undesirable, and that deportation was thought the easiest way to get rid of him and to avoid the normal processes of law—all these warn us of the dangers inherent in a system where prosecutor and judge are one and the ordinary rules which protect the accused are in abeyance. It is apparent how easy is the descent by short cuts to the disposition of cases without clear legal grounds or evidence which rationally proves them. These are the essence of any hearing in which the personal feelings of the tribunals are not to be substituted for prescribed standards." (Italics ours.)

Respectfully submitted,

J. Edward Keating and
Theodore E. Bowen,
Counsel for Appellant.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, that the matter be reargued, and that the judgment of the District Court of the United States for the Southern Division of California, Central Division, be, upon further consideration, reversed.

Respectfully submitted,

J. Edward Keating and
Theodore E. Bowen,
Counsel for Appellant.

I, one of the counsel for the above named Keizo Kamiyama, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

.....
Counsel for Appellant.